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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 30

FLORENCE M. COOK,
Petitioner,

v.

ARTHUR W. COOK,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

PETITIONER'S BRIEF

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

The Opinions Below

The trial court made findings of fact and what amounted to conclusions of law thereon without formal opinion. (R. 12). The Supreme Court of Vermont rendered a formal opinion (Original transcript P. 34, 36-37), entered a decree thereon, November 15, 1950. The opinion is reported under the style *Cook* vs. *Cook*, 116 Vt. , Atl. 2nd.

Jurisdiction

The judgment of the Supreme Court of Vermont was entered on November 15, 1950. (R. 22). This petition was presented within 90 days from the entry of the judgment below. Jurisdiction is invoked under Section 237 (b) of the Judicial Code, 28 U.S.C. Sect. 344 (b). The ques-

tions presented were raised by a reversal of a judgment of the Windsor County Court, and the entry of an appellate decree annulling the marriage of the parties hereto by avoiding a divorce obtained by petitioner in the State of Florida.

Questions Presented

1. Did the Vermont Court err in avoiding a Florida divorce of petitioner, at the suit of her second spouse upon the sole ground that petitioner did not acquire a 'bona fide' residence in the divorce forum, without a finding as to the marital domicile of the parties to the divorce.

   a. In the absence of evidence or finding of the matrimonial domicile of the parties to a divorce, may a sister state refuse to accord full faith and credit to the decree of the divorce forum solely upon a finding that the residence of the libellant was not bona fide in that it was only designed to secure a divorce.

2. Where by petitioner's Florida decree of divorce the domicile of the respondent is found as a fact may Vermont, at the suit of the second spouse of petitioner, deny full faith and credit and avoid the divorce decree on the ground that petitioner's residence in Florida was solely for the purpose of securing a divorce.

3. Does the rationale of the second Williams case permit a second spouse who induced petitioner to secure a divorce in Florida, in which the parties both appeared and participated, to relitigate jurisdictional issues in a sister state where none of the parties were ever matrimonially domiciled.

4. Where parties to a divorce both appeared and participated in the proceedings may a sister state, at the suit of a second spouse, in which state parties to the second marriage never cohabited, relitigate the jurisdictional finding of the divorce forum, where the fact of second mar-

riage has been judicially found by a third court in whose jurisdiction the parties were admittedly domiciled as husband and wife.

Statement

Petitioner at the instigation and with the financial help of respondent left Newport News, Virginia, where she had a meretricious relationship with respondent, and secured a divorce in Florida, in which proceeding petitioner's husband appeared and participated. (Original transcript P. 20). Several months later she married respondent in Elkton, Maryland and the parties returned to New Port News. Thereafter, respondent, who was an officer in the Navy, was assigned to Hawaii, where the parties again lived as man and wife, (R. 14). Three suits affecting the domestic relationship of the parties here were filed in the Territorial Court of Hawaii. In two of these suits respondent claimed under oath that he was and had been a resident of Hawaii for two years and that petitioner and he were domiciled there. (R. 14).

Petitioner filed a suit for separate maintenance in the same Court, affirming the allegation of residence and domicile in Hawaii and respondent appeared, with counsel, and a decree was entered on April 7, 1946, ordering payment of maintenance for a period of two years. (R. 15). In 1949, while the maintenance order was still pending and extant, respondent initiated the instant cause, seeking the annulment of his marriage to petitioner because her Florida decree was void because of her simulated residence in Florida. In this proceeding the respondent claimed residence in Vermont since 1938, although asserting that he had been absent from the state some ten years. (R. 13). It further appeared that while the instant cause was pending, but unserved on petitioner, a non-resident of Vermont, petitioner and respondent cohabited. (R. 16).

The trial Court did not make a finding as to the matrimonial domicile of petitioner and her former husband at the time of the divorce in Florida, but rested its finding on the fact that petitioner never intended to permanently live in Florida and only resided there for the purpose of securing a divorce, and intended upon its entry to return to and marry respondent. (R. P. 15). The trial Court, however, accorded full faith and credit to the Florida decree and dismissed the annulment suit as to the Maryland marriage of the parties hereto (R. 14). Upon appeal, however, the Supreme Court of Vermont, upon the authority of the second Williams case, and upon the showing that petitioner's residence was solely for the purpose of getting a divorce and marrying respondent, reversed, and decreed that the Florida decree was void. (Original transcript, P. 34, 36-37).

Summary of Argument

Petitioner contends that the second Williams case, 325 U. S. 324 L. Ed. , does not relieve a sister state of the obligation of full faith and credit to a foreign judgment where the forum rendering the judgment had jurisdiction of the res and the parties personally, in the absence of a want of power apparent on the record. The obligation of a Court to extend full faith and credit is not diminished because it might conclude a jurisdictional issue in a different way or because evidence dehors the record in the trial forum, although available, was not presented.

Your petitioner suggests that neither the State of Vermont or respondent acquired in Vermont a right, interest, or property in the marriage contract of petitioner and her prior husbandman as would permit either of them to do in Vermont that which neither litigant or stranger could or can do in the forum of the judgment.

Points 1 and 2

Respondent's annulment suit depends on a finding by the Vermont trial Court that the Florida decree was void for lack of jurisdiction. This finding is bottomed by the appellate court on testimony adduced in Vermont contrary to the evidence produced before and finding by the Florida court as to the "domicile" of petitioner. Without recourse to the doubtful expedient[1] of finding lack of jurisdiction over petitioner, as complainant there, at the suit of a stranger by matter not apparent on, but 'dehors' the record, it is striking that such was its undertaking without reliance on the consecrated rubric that Vermont had an overriding interest in the marriage contract between petitioner and her first husband. The fact, found by the Florida Court, that it had jurisdiction over the marital res, or of the equally compelling circumstance that both parties were before the Florida Court did not merit judicial notice in the appellate court's opinion although considered to be of considerable moment by this Court.[2]

Florida, under any circumstances, is the final arbiter of the criteria of domicile or residence of its citizens. The Florida statute does not, in so many words, require "domicile" as a prerequisite to a suit for a divorce, but fixes a 'period of actual residence' of the complainant as the

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[1] As a general rule, unless authorized by statute, a stranger to the record has no standing directly to attack a judgment either by a motion (or petition) in the original proceedings, or by independent suit, irrespective of whether the grounds go to the jurisdiction to render the judgment void or to defects making the judgment voidable only. *Tyler* v. *Aspinwall* 73 Conn. 493; *Suiter* v. *Suiter* 74 O. App. 44, 57 N.E. 2nd. 616; *DeMarigny* v. *DeMarigny*, Fla. , 43 So. 2nd. 442; *Van Slyke* v. *Van Slyke*, 186 Mich. 324, 152 N.W. 921.

[2] Cf. *Williams* v. *North Carolina*, 325 U. S. 226; *Sherer* v. *Sherer*, 334 U.S., 343.

jurisdictional condition precedent. While other States have judicially used 'residence' and 'domicile' interchangeably, no reason appears to treat the statutory language in any other way than in its natural connotation.[3]

In the case of *Curley* v. *Curley*, 198 So. 584, at page 586, the Court said:

> "Therefore it is our conclusion that the burden of proof in this case was on the plaintiff's wife to show that she resided in Florida for a period of ninety days prior to the date of filing the suit for divorce and at the time of taking up her residence in Florida she had the capacity to acquire a separate domicile of her own in the State of Florida."

It is apparent from the record also that there is no property right or interest of respondent existing at the time which was affected in any way by the decree of divorce obtained by petitioner from her husbandman.

Under these conditions, there would seem to be no justification for failing to follow the dictates of Section 1738, 28 U. S. Code,[4] and extend full faith and credit to the Florida decree where, as it appears, Florida would not permit such a relitigation at the suit of a stranger.[5] It would seem to slender a tendril to found the vacation of a formal judgment that a woman's intention to marry a serv-

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[3] "In order to obtain a divorce the complainant must have resided ninety days in the State of Florida before filing the bill of complaint", Florida Statutes Annotated Section 65:02.

[4] Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the Courts of such State, territory or possession from which they are taken.

[5] *Johnson* vs. *Muelberger*, __ U.S. __, 95 L. Ed. 411, (1950); *DeMarigny* v. *DeMarigny*, 43 So. 2nd 442.

iceman, located in another state, would necessitate a finding of a lack of domicile.

The justification for the relitigation of the jurisdictional issues existing in the second Williams case (325 U. S. 234) do not obtain in the case at bar. Here there is no invasion of the proprietary interest of state for the status of domiciliaries. Petitioner and her first husband were never domiciled, residents or visitors in Vermont except in this litigation. The divorce of petitioner and her husband cannot be attacked by either of them outside of the State of Florida by virtue of the Sherer and Coe,[6] *infra*, and by no third person, whatever his or her interest, in the State of Florida.

Moreover, in the instant case, the proper criteria and standards of proof for collaterally or directly attacking a judgment based upon domicile have been completely disregarded by the Court below. Here we do not have parties foisting the relaxed divorce laws of a sister state upon the hapless state of domicile but the spectacle of a state, a stranger to the resident, parties and domicile refusing full faith and credit at the suit of a stranger to the divorce forum and decree.

However strong judicial distaste for "easy" divorce may grow the remedy could not consistently be "easy" annulment through the office of denial of full faith and credit. In regard to the divorce of parties, not domiciles of the inquiring state, and save intervening property rights of third party resident litigants, there would seem to be no cogent reason to prefer the propriety of the subsequent determination of any one of the remaining forty-seven to the final determination of the first state. In the case at bar even the temporarily successful respondent should be wary for should the jurisdictional jealousies of

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[6] *Sherer* v. *Sherer*, 334 U.S. 343; *Coe* v. *Coe*, 334 U.S. 378.

Maryland, Virginia and Hawaii be aroused, his "domicile" in Vermont might be hard to reconcile, upon "relitigation", with his birth in Massachusetts, marriage in Maryland, its consummation in Virginia or his oath in Hawaii.

Points 3 and 4

Petitioner and her first husband appeared in the Florida Court [7] and the issue as to residence for divorce purposes and question as to the marital domicile were properly before it for determination. Full opportunity to litigate those issues was open to the petitioner and her first husband. However under the rule as announced in the Sherer and Coe cases, *supra*,[8] these issues were not open to relitigation in Vermont by the parties' second spouses or strangers, when such avenues of attack were not permitted in the divorce forum. In the absence of the overriding interest of a state in the contract of marriage of its domiciliaries and even if jurisdiction had been acquired by publication alone, the decree would have been secure from collateral attack under either the first [9] or the second Williams case.[10] However paramount the interest of a state in the status of its domiciliaries, such interest must be evinced in a form and manner consistent with the fundamental requisites of "due process" and "full faith and credit". A state may not, under the guise of effectively supervising the marriage status of one of its citizens, render nugatory the exercise of a similar power by a sister state over its domiciliaries. Thus revealed the claim negates itself.[11] The opposite conclusion leaves its un-

[7] Opinion of the Court below.

[8] *Sherer* v. *Sherer, supra; Johnson* v. *Muelberger, supra; DeMarigny* v. *DeMarigny, supra.*

[9] 317 U. S. 287.

[10] 325 U. S. 226.

[11] *Davis* v. *Davis* 305 U. S. 32.

welcome debris at the doorstep of petitioner's first husband, without the casual notice 'by publication'; although time will doubtless produce some unwitting, but perplexed, citizen with the dilemma of relying on Florida for validity of her dower and legitimacy of her children, or to some more considerate State and Court for relief from Vermont's alternative.

Here Mann and petitioner were not domiciled in Vermont. No one knows, as far as this record is concerned, where Mann was domiciled, or where the matrimonial domicile of their marriage was. There is no finding that Florida did not have jurisdiction of the 'res' of the marriage. The failure of the Vermont Court to give full faith and credit is a further invitation to Courts to turn deaf ears to the warning of this Court in the *Sherer* case, *supra*, and require litigants "to run the gauntlet of such collateral attack" in the several states before its validity outside of the divorce forum may be established. Nor does the spectre of the litigation in Hawaii or Florida hanging in the balance at the whimsy of respondent's litigious impulses recommend the voiding of the Florida and Hawaii decrees.

Conclusion

In consideration of the premises it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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